IN THE HIGH COURT OF UTTARANCHAL
AT NAINITAL
Criminal Appeal No. 979 of 2001
(Old No. 434 of 1983)

Nanua Ram
R/o Village Baralu
Police Station Pithoragarh
District Pithoragarh ...Appellant

Versus

State ...Respondent.

Sri Manta Bisht (Amicus Curiae), learned counsel for the appellant
Sri Nandan Arya, learned A.G.A. for the State

Hon'ble B.C. Kandpal, J.

1. This criminal appeal arises out against the judgment and order dated 31.01.1983 passed by Sessions Judge, Pithoragarh in Sessions Trial No. 2 of 1982, convicting the accused/appellant under Section 363 and 366 I.P.C. and sentencing him to undergo rigorous imprisonment for four years each under the aforesaid sections.

2. Brief facts of the prosecution case are that on 21.12.1980, the accused namely, Nanua Ram along with his mother came to the house of the complainant – Bhanu Ram in the evening and made a proposal for marriage of Km. Ishwari aged about 16 years, daughter of the complainant with Nanua Ram. The complainant refused to marry her daughter with Nanua Ram as he had already two children with his first wife. On 23.12.1980, the complainant left his house in the morning hours and when he returned back to his house in the evening, his wife Smt. Dhani Devi told him that Inshwari had gone to jungle to collect wood in the day time and since she did not return back to the house. On the same day two persons, namely, Kharak Ram and Prayag Ram told the complainant that during daytime they had seen the accused person taking

Ishwari through the Jungle “Wadda”. Thereafter he came to know that his daughter is at the house of the accused – Nanua Ram. The complainant lodged the written First Information Report on 26.12.1980 at 15:20 hours for the offence under Sections 363, 366 I.P.C. at police station Pithoragarh.

3. After lodging the First Information Report, Sri Kamal Singh – S.I. started investigation in the matter. On the next day morning i.e. 27.12.1980 at about 05:30 a.m. Investigating Officer along with complainant and other police officials reached at the house of Nanua Ram and arrested him along with Km. Ishwari. They also took Smt. Kausalya Devi at the spot who was in the third story. Thereafter, a recovery memo (Ex.Ka.2) was prepared by the Investigating Officer and handed over the copy of the same to the accused. The Investigating Officer also prepared the site plan (Ex.Ka.6) on the same day. Km. Ishwari was sent for medical examination to Hargovind Mahila Chikitsalaya, Pithoragharh.

4. Dr. Hemlata Pal examined Km. Ishwari on the same day i.e. 27.12.1980 at 01:45 p.m. and prepared the medical report (Ex.Ka.9). Dr. Hemlata Pal found that the hymen old posterior tear was present, but no injury was seen on the private part or any other part of the body. Further on 03.01.1980, the Medical Officer reported that vaginal smear did not show any spermatozoa and there were no sign of recent intercourse. Hari Ram – Technician of the District Hospital, Pithoragarh had done X-ray of the wrist and elbow joints of the victim. Dr. Pal gave a supplementary report on 29.12.1980 mentioning therein that the X-ray report shows head of the radius fused to shaft distil humeral epiphysis fused to shaft and distil ends of the ulna and radius partially fused to the shaft. As per the opinion of the Medical Officer,

the age of Km. Ishwari was between 16-18 years at the time of the incident.

5. The Investigating Officer – Sri Kamal Singh – S.I. after completion of the medical examination of Km. Ishwari handed over her to his father – Bhanu Ram and prepared a *Fard Supurdaginama* (Ex.Ka.6). The Investigating Officer submitted the chargesheet on 03.02.1981 against both the accused persons for the offence under Sections 363, 366 and 376 I.P.C.

6. After submission of the chargesheet the accused/appellant was committed to the Court of Sessions and the learned Sessions Judge, Pithoragarh on 15.02.1982 framed the charge under Sections 366 read with Section 34 I.P.C. and under Section 376 I.P.C. against him. The accused denied of the charge levelled against them and claimed their trial.

7. The prosecution in order to support its case produced Bhanu Ram (P.W.1) – complainant (father of the victim), Km. Ishwari (P.W.2) – victim, Gambhir Singh (P.W.3), Roop Ram (P.W.4), Hajari Chand (P.W.5), Kharak Singh (P.W.6), Sri Kamal Singh (P.W.7) – Investigating Officer, Dr. HemLata Pal (P.W.8) and Hari Ram (P.W.9) – Technician.

10. After the evidence of the prosecution was over, the statements of the accused were recorded under Section 313 of the Criminal Procedure Code. The accused persons did not adduce any evidence in their defence.

11. The learned trial court, after hearing learned counsel for the parties and having perused the entire evidence

on record convicted the accused – Nanua Ram Under Section 363 and 366 I.P.C. and was sentenced to four years rigorous imprisonment under both the sections. However, he was acquitted of the charge under Section 376 I.P.C. As well as other accused namely, Kausalya Devi is concerned she was also acquitted by the Sessions Court from the charges leveled against her under Sections 363, 366 I.P.C. read with Section 34 I.P.C.

12. Feeling aggrieved by the impugned judgment and order, the convict/appellant preferred the appeal before the Allahabad High Court, which has been transferred to this court after creation of new State of Uttaranchal.

13. Heard Sri Mamta Bisht (Amicus Curiae), learned counsel for the appellant, Sri Nandan Arya, learned A.G.A. for the State and perused the record.

14. Record of this case reveals that Smt. Kousalya Devi and Nanua Ram were challaned under Sections 363, 366 and 376 I.P.C. but the trial court after examining the entire evidence adduced by the prosecution came to the conclusion that the charges under Sections 363, 366 I.P.C. could not be established against the accused – Kousalya Devi who is the mother of the present accused Nanua Ram. The trial court accordingly acquitted her with the charges levelled against her vide impugned judgment and order dated 31.01.1983.

15. It is pertinent to mention here that no appeal against the acquittal of the accused – Kousalya Devi has been preferred by the State.

16. Further the accused/appellant – Nauna Ram was charged with Section 363, 366 and 376 I.P.C. but the trial court after the assessment of the evidence also came to the conclusion that the prosecution has failed to give any strong evidence on the question of rape. The trial court was of the view that the accused/appellant – Nauna Ram might have kidnapped the girl – Km. Ishwari and kept her confined in his house but there is no evidence that he made any immoral overt act to molest her chastity. The trial court therefore, did not accept the testimony of the prosecutrix on the factum of rape. The testimony of the prosecutrix indicates that she had left her father's house on her own accord and will. It also reveals that she also consented to sexual intercourse. The State has also not filed any appeal against the acquittal of the accused/appellant Nanua Ram for the offence under Section 376 I.P.C.

17. Now the question remains as to whether the prosecution has successfully established the guilt of the accused/appellant under Sections 363, 366 I.P.C.

18. It is argued on behalf of the State that the prosecutrix was below the age of 18 years on the date of the occurrence. Therefore, looking to the age of the prosecutrix, the offence under Section 363 I.P.C. has been established against the accused/appellant beyond reasonable doubt. It has been further submitted by the learned A.G.A. for the State that the charge under Section 366 I.P.C. ahs also been established against the accused/appellant because on the basis of the evidence it is quite clear that the accused/appellant kidnapped Km. Ishwari with the sole intention that he would marry her.

19. Learned counsel for the appellant on the other hand has argued that the age of the prosecutrix could not be less then 18 years on the date of the occurrence. It has been submitted that the evidence available on record clearly establishes that the prosecutrix was more than 18 years in any case on the date of the occurrence.

20. In order to appreciate the arguments advanced by the learned counsel for the parties, I will have to closely scrutinize the evidence available on record.

21. The prosecution in order to establish the age of the prosecutrix has produced the father of the girl Bhanu Ram as P.W. 1, Km. Ishwari (Prosecutrix) – P.W. 2, Hajari Chandra – Gram Pradhan P.W. 5 and lady doctor Dr. Hemlata – P.W. 8.

22. As far as the deposition of P.W. 1 Bhanu Ram who is the father of the prosecutrix is concerned, his testimony does not inspire confidence. In view of the fact that if the calculations are made with reference to the various ages of other children of Bhanu Ram on the basis of the dates deposed by him, the age of the prosecutrix Km. Ishwari would not be actually worked out to be correct. When the deposition of Bhanu Ram was recorded on 14.04.1982, he disclosed his age as 50 years. He has deposed that he got the horoscope of all of his children prepared except Km. Ishwari. He has stated that when he was aged about 23 years then he was married and after seven years of his marriage his daughter was born whose name is Godawari, he has stated that he has got another daughter after some time and thereafter he has son Raju Ram and thereafter Km. Ishwari was born. He has stated that he has mentioned the age of the daughter Km. Ishwari 16 years on the basis of assumption. He has stated that he

cannot tell as to whether which daughter was born in which year. He has also stated that he cannot tell the exact age of his eldest daughter Godawari, therefore, the testimony of this witness with regard to the age of the prosecutrix does not inspire confidence.

23. Now, the testimony of the prosecutrix if examined then it reveals that she has deposed that she has not studied in any school and she does not know the numbers 1, 2, 3.... She has also stated that she cannot tell as to in which year she was born. She also could not tell the age of her brothers and sisters. Therefore, the testimony of Km. Ishwari on the question of her age also cannot be safely accepted.

24. The testimony of another witness, who is Gram Pradhan of the Village Hajari Chandra (P.W. 5), is to be looked into. This witness has stated that he maintains the *Pariwar Register* regularly. He has stated that when another daughter of Bhanu Ram, namely, Nanda was born, the entry about her date of birth was made in the *Pariwar Register* on 11.02.1970. This witness has not disclosed the date of birth of Km. Ishwari in the *Pariwar Register*. Rather he has stated in his cross-examination that in the column of the birth, only year has been entered but at some places the months and the dates has also been entered. He has also stated that he does not know as to on what basis the date of birth pertaining to daughters of Bhanu Ram, has been entered. Therefore, the evidence of Gram Pradhan shows that he is so scrupulous in discharging of his duties relating to maintaining of *Pariwar Register.* It can therefore, safely been inferred that this possibility cannot be ruled out that the prosecution to manipulate the case, somehow got entered the date of birth of Km. Ishwari in the

Pariwar Register. Therefore, it would not be very safe to rely on this evidence alone.

25. Now the medical evidence which is pertaining to the age of the prosecutrix remains and the Dr. Hemlata (P.W.8) has given her report on the basis of the X-ray plate opining that the age of Km. Ishwari was between 16 to 18 years when Dr. Hemlata was examined before the court she said that the prosecutrix was habitual of sexual intercourse. She has also stated in the cross-examination that in view of the cold climate and the irregular diet there can be a delay in the fusion of the bone joint. She has thus deposed that Km. Ishwari could be aged about 21 years also. Therefore, in view of the doctor's evidence, it can be safely inferred that it is border line case, where the prosecutrix might be approximately 18 years of age on the date of occurrence. Further I may point out that the Hon'ble Supreme Court in the case of ***Rajender Chandra Vs State of Chandigarh*** reported in ***2002 Supreme Court Cases (Cri) 333*** has viewed that there may be variation of two to three years on either side, as is permissible on the basis of the Modi Medical Jurisprudence in the result of the ossification test and therefore on the basis of such test no definite opinion could be formed. The Hon'ble Supreme Court has further held that if two views may be possible on the basis of evidence adduced, then the court should lean in favour of the accused in the border line cases.

26. In the instant case, the evidence adduced by the prosecution clearly shows that it is a border line case and the prosecutrix on the date of the occurrence was approximately 18 years of age, therefore, under these circumstances the benefit to the accused is bound to be extended.

27. For the reasons stated above, I am of the view that the prosecutrix – Km. Ishwari eloped with the accused/appellant on her own will. She remained in the company of the accused/appellant for several days without creating any hue and cry. The age of the prosecutrix on the basis of the evidence adduced by the prosecution was approximately 18 years which is a border line case. Therefore, keeping in view the entire facts and circumstances of the case, I am of the opinion that the impugned judgment and order passed by the learned Sessions Judge convicting and sentencing the appellant under Section 363, 366 I.P.C. is liable to be set aside.

28. Accordingly, the appeal is allowed. The judgment and order dated 31.01.1983 convicting and sentencing the accused/appellant under Sections 363, 366 I.P.C. is hereby set aside.

29. Consequently, the accused/appellant is acquitted of the charges leveled against him under Sections 363, 366 I.P.C.

(B.C. Kandpal, J.)

26.07.2006
ASWAL